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AUTHOR Drobnicki, John A.
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ABSTRACT

Many activities that take place in the library, including circulation and interlibrary loan and reserve requests, result in the creation of records linking clients to specific kinds of information. Several groups, including law enforcement officials, have attempted on various occasions to gain access to these records. This research paper provides a broad overview of the legal and ethical issues regarding the confidentiality of library user's records, including federal, state, and court protection for the confidentiality of library records, the status of library records that are part of a public institution, and a minor's right to privacy. The paper also discusses several prominent cases related to the privacy issue. (Contains 29 references.) (Author/KRN)

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THE CONFIDENTIALITY OF LIBRARY USERS' RECORDS

by

John A. Drobnicki

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ABSTRACT

Many activities which take place in the library result in the creation of records linking clients to specific information requests. Several groups, including law enforcement officials, have attempted on various occasions to gain access to these records. A broad overview of the legal and ethical issues regarding the confidentiality of library users' records is provided, and a number of prominent cases are discussed.

There are many activities which take place daily in a library which may result in the creation of a record linking a patron with an information request: circulation records show the items that a patron has borrowed or just returned; overdue records show what items a patron borrowed but returned late; interloan requets reveal what a person is interested in and would like to read; database search records show what subject a person is researching; and requests for photocopy duplication, also, reveal what a person is interested in.

Persons seeking access to these records can range from law enforcement officers to nosey busy-bodies, from police seeking information about a specific individual to a student wanting to know who has the book that he or she desperately needs to consult for a term paper. Over the past three decades, the question of the confidentiality of these library records has been raised and challenged on numerous occasions. In 1970, U.S. Treasury agents attempted to obtain circulation records in various cities, seeking to find people who had been reading books on the manufacture of bombs and explosives.[1] In 1987, the FBI began a "Library Awareness Program," wherein they wanted, in the words of an FBI spokesman, to "alert those in certain fields of the possibility of members of hostile countries or their agents attempting to gain access to information that could be potentially harmful to our national security."[2]

The motives of the aforementioned government agents might certainly be deemed laudable--after all, no one wants people to set off bombs and

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[1]Bruce S. Johnson, "'A More Cooperative Clerk': The Confidentiality of Library Records," Law Library Journal 81 (1989): 775-776.

[2]Milt Ahlerich, 31 July 1987, as quoted in "FBI Asks Libraries to Report Foreign Readers," Newsletter on Intellectual Freedom 36 (1987): 241.

injure innocent people, or engage in espionage that could hurt their own country. One might ask, then, "Why is the confidentiality of library users' records so important?"

Most people would agree that the mission of the library (and the librarian) is to provide access to information. The only way that a person can have access to any and all information is if he/she fears no recriminations for having examined them. Some borrower records can contain information that could prove embarassing or which could be used by others to harass and intimidate someone. A patron might not want the whole neighborhood to know that he/she likes to read "trashy" romance novels--and since the definition of "obscenity" is unclear, some of these novels might be considered to be pornographic.

When a person purchases an item from a mail-order catalog, they know that their name might then be sold to another company compiling a mailing list. But when they supply personal information to their local library to obtain a library card, they are not expecting that that information be given out to anyone else--there is a bond of trust between the patron and the library.

If patrons felt that the library could not be trusted, they might use fake names or, even worse, engage in self-censorship, avoiding controversial literature.[3] If records were open to anyone, then why read Marx or Lenin if the people in your home-town might brand you a subversive? "This atmosphere of distrust would prevent a library from

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[3]Johnson, 778; Bruce M. Kennedy, "Confidentiality of Library Records: A Survey of Problems, Policies, and Laws," Law Library Journal 81 (1989): 741.

carrying out its mission."[4]

It has been reported on television news broadcasts and in newspapers how people suffering from AIDS have great difficulty acquiring, or maintaining, health and life insurance. If an insurance company had access to circulation records and found that one of their clients had been borrowing books such as Living With AIDS, they might be tempted to drop him or her from their coverage. Information such as this could be used to harass, or even blackmail, someone.

What many fail to realize is that books and other library materials are in no way reliable indicators of a person's thought processes.[5] The fact that someone borrowed material does not mean that they agreed with the author's thesis, or that they even read the material. It is not safe to assume anything from library users' records. Thus, someone reading Marx or Lenin might be a fellow traveler or a political scientist; someone reading Mein Kampf might be a budding Nazi or a student of German history. The thought that taking out some books on explosives might land him or her on a "suspect list" might deter a budding demolitions expert from using the public library. Does the fact that a young couple recently checked out books on infertility mean that they are having trouble conceiving a child, or that they know someone else who is? Imagine the blow to a man's gigantic ego if patron records were open to the public and it became known that he was having trouble in bed.

The connection between library records and databases and networks

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[4]Johnson, 779.

[5]Kennedy, 741.

is also troubling in regard to confidentiality. It has been shown how many databases in the United States are subject only to weak or inadequate regulation, and how many of them are not vigilant in weeding out inaccurate information about people.[6] The thought of what information a credit reporting bureau might deduce about someone from their library records and place in their file is chilling. If suspicious borrower activity actually prompted a government investigation, the information that they gathered could come back to haunt someone in the future.[7]

The use of automated circulation systems, which saves time and energy, has also led some to worry about security protections, especially since computer "hackers" can seemingly enter almost any system that they want to.[8] Most libraries that are automated, however, use passwords to allow access to their databases, providing some protection for their patrons' privacy. For example, the DRA automated circulation system used by the Queens Borough Public Library in New York requires the user to type in a user name (which is assigned to that particular agency) and a password (which, again, is assigned to that particular agency). Thus,

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[6]This is discussed in two articles by Michael Rogers Rubin: "The Computer and Personal Privacy, Part I: The Individual Under Assault," Library Hi Tech 5 (1987): 23-31, and "The Computer and Personal Privacy, Part III: The Regulation of Computer Records in the United States," ibid. 7 (1989): 11-21; and in Harry M. Kibirige, The Information Dilemma: A Critical Analysis of Information Pricing and the Fees Controversy (Westport: Greenwood Press, 1983), 100-101.

[7]Kennedy, 740.

[8]Angela C. Million and Kim N. Fisher, "Library Records: A Review of Confidentiality Laws and Policies," Journal of Academic Librarianship 11 (1986): 348; Tova Horenstein and Isabel Schon, "Maintaining Privacy of Patron Records," Technicalities 8 (1988): 10-12.

a hacker would need to discover two pieces of identification to access any information in those computers.

What disturbs some about automated systems is the thought that information might be stored in them indefinitely. Automated circulation systems that are chosen by libraries should be ones that purge borrower information as soon as an item is returned, erasing the link between the patron and the item.[9] As one writer has noted, "Libraries should become information storage centers for their patrons, and not about their patrons."[10] Or, put another way, "Even with a court order, one cannot obtain records that do not exist."[11]

The constitutional basis for the privacy of library users' records is uncertain. The U.S. Supreme Court has never authoritatively established the principle of the right to receive speech, although several Justices have expressed this principle.[12] Nor has the Court established a first amendment right to privacy of use of a public institution.[13] In Brown v. Johnston, the Iowa Supreme Court ruled that library users did not have constitutional privacy rights against the police.[14] In fact, "No reported court opinions at either the state or federal level hold that library users have a right to privacy for the information in these

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[9]Janis M. Lee, "It's the Law!" Catholic Library World 60 (1988): 82; Kennedy, 766; Horenstein and Schon, 10.

[10]Kennedy, 766 (emphasis in the original).

[11]Horenstein and Schon, 12.

[12]Kennedy, 747-750.

[13]Johnson, 788.

[14]Kennedy, 751.

[library] records."[15]

The lack of federal and court protection for the confidentiality of library patrons' records has left it up to the individual states to deal with the matter. As of 1990, 41 states and the District of Columbia have enacted laws which, to one degree or another, protect the confidentiality of library users' records.[16] Recognizing that there are legitimate instances when the police or government officials might need to consult records, the laws generally allow access to patron records upon presentation of a court order or subpoena, or if the patron provides written approval.[17]

The patron's right to privacy muse be balanced against the public's right to know in some instances. Many states have "open-access" laws, allowing the public to examine their government's records, a fundamental tenet of a democratic society. However, since almost all public libraries are considered to be part of a government (local or state), this could leave their records open to the public, which has actually happened.[18] As has been pointed out by the American Library Association's General Counsel, "Library circulation records do not contain information regarding the affairs of government but contain information only about the reading habits and propensities of individual citizens."[19] Thus some states, when drafting their "freedom of information" statutes,

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[15]Johnson, 794.

[16]Kennedy, 754.

[17]Ibid.

[18]Richard Rubin, "The Threat to Library Circulation Records: A Case Study," Library Journal 109 (1984): 1602-1606.

[19]Quoted in Kennedy, 737 (emphasis in the original).

expressly excluded library records from them.[20]

As has been noted earlier, circulation records are not the only records in a library which link a patron to an information request. In the Central Research Library of the New York Public Library, in order to even look at any materials, a patron must fill out a request slip with his/her name, address, and academic/business affiliation. In some library systems, when a patron wants to reserve a book, they must fill out a postcard which is used to notify them when the book has arrived, with the title and author exposed for anyone (usually the mailman) to see. Simple questions asked of a reference librarian also link a patron to information; should, then, the librarian discuss a reference interview with colleagues?[21]

Because there are so many different records in a library which link a person to an information request, state laws must be crafted to be inclusive of all of these. For example, New York State's 1982 law only protected library circulation records, a fact which became clear when, in 1986, the FBI requested information concerning a particular database search conducted at the State University of New York at Buffalo.[22] Concerned library professionals, however, pushed for an amendment, and in 1988, instead of only circulation records, New York's

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[20]Kennedy, 755-756.

[21]Mark Stover, "Confidentiality and Privacy in Reference Service," RQ 27 (1987): 242.

[22]Marcia Zubrow, "The Right to Confidentiality in Libraries: New York State Changes its Law," Bookmark 47 (1989): 89-90.

law was changed to protect the confidentiality of records

> including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records. . . .[23]

This is an example of how laws must be revised to keep up with changing technology and a testament to the vigilance of New York's librarians. After all, even though 42 jurisdictions have confidentiality laws, they lack the mechanisms to enforce them--so it is up to the librarians and other library employees to protect their patrons' right to privacy.

The American Library Association has issued many statements concerning the privacy of users' records, and in 1971 it issued a formal "Policy on Confidentiality of Library Records."[24] Recognizing that it is up to the library staff to protect confidentiality, ALA urged all libraries to "formally adopt a policy which specifically recognizes its circulation records and other records identifying the names of library users to be confidential in nature."[25] Even if a state has a confidentiality statute, a formal library policy will see to it that the staff members most likely to be approached will at least have been made aware of library users' right to privacy; in states without laws, a formal library policy might deter all but the serious requests for access to records. In 1981, ALA also incorporated patron privacy into

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[23]New York, Civil Practice Law and Rules, 1990 Supplementary Pamphlet (St. Paul, MN: West Publishing Co., 1990), §4509.

[24]American Library Association, Intellectual Freedom Manual, 3rd ed. (Chicago: ALA, 1989), 106.

[25]Ibid. This sentiment has been echoed by Million and Fisher, 349; Horenstein and Schon, 12; and Johnson, 801.

its "Code of Ethics" for librarians.[26]

Decisions to protect library users' privacy have not always been popular or easy for the librarian involved. Following a shooting rampage in Pennsylvania in 1985, it was discovered that the suspect had been in the local library earlier that day, and reporters, lawyers, and detectives all wanted to know what she had borrowed or asked on that day and on previous visits.[27] Although protecting the privacy rights of an alleged murderer was not the popular thing to do, the library's Director, in compliance with Pennsylvania's law, refused to release any records until the proper court order was served.[28] Earlier in the 1980s, a death threat against then-President Reagan was found scribbled in a book that had just been returned in an Oneonta, New York, library. The library Director promptly notified the authorities of the death threat, but when she refused to reveal the circulation record of the book without the proper court order, her loyalty and patriotism were questioned by the agents, and she was bluntly told to get a lawyer because she was in for trouble.[29] In both instances, the librarians complied with the law and protected user confidentiality until a court told them to do otherwise, although it would certainly have been easier and would have caused them less immediate grief to have just turned a (collective) blind eye.

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[26]"On Professional Ethics," American Libraries 12 (1981): 335.

[27]Janis M. Lee, "Confidentiality: From the Stacks to the Witness Stand," American Libraries 19 (1988): 444.

[28]Ibid., 446.

[29]Marie Bruce Bruni, "Fruit Jars on the Windowsills: Personal and Professional Ethics in Library Practice," Bookmark 47 (1989): 93-95.

There are many instances when the library professional must make tough choices. A teacher, suspecting plagiarism, might ask the school librarian what books little Johnny consulted or might have consulted.[30] The question of the privacy rights of minors is not an easy one. Five states allow disclosure of a minor's library records to the child's parent or guardian.[31] As one writer has pointed out, it is very difficult to tell a parent that he/she must pay for a child's lost book, and then try to deny them the right to know the title of the book.[32] One writer, believing that the law is "too restrictive on parents," has written that, "If they [parents] have responsibility for the upbringing of their children in every other regard, why is it that they cannot protect the most important part of their children's development, the development of the mind, and its effect on the will."[33] The privacy rights of children versus parents is certainly a fine line for the librarian to tread.

There <u>are</u> some instances when the government or law enforcement personnel do need access to library patrons' records. This was brought up again recently due to New York City's "Zodiac Killer." Police believed that the killer may have been inspired by an Aleister Crowley book, and they obtained a subpoena to examine the New York Public Library's circulation records.[34] Queens Borough Public Library

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[31]Kennedy, 763. The five are Alabama, Alaska, Louisiana, New Mexico, and Wyoming.

[32]Lee, "It's the Law!" 81.

[33]Jovian P. Lang, "Readers' Response," <u>Catholic Library World</u> 60 (1988): 83.

[34]"Police Subpoena Library Records in Hunt for NYC's Zodiac Killer," <u>American Libraries</u> 21 (1990): 703, 706, 708.

Director Constance B. Cooke promptly issued a memo to all QBPL staff, reminding them of New York State's Law and of the library's policy, in case the police approached any of them. She wrote that, "We cannot afford to get swept up in a panic or do anything to violate this law or the public's trust in the Library."[35]

As long as state laws allow access to library users' records, libraries must comply--it is just up to an impartial court to formally order them to. However, it is never justified for law enforcement officers to go on fishing expeditions, using library records as "suspect lists" and sifting through them looking for "suspicious" behavior. To obtain their subpoena or court order, they should have to show good cause. If the library believes that the court order was issued improperly, ALA has told its members to resist it.[36]

If a librarian or library employee does improperly release library users' information, he/she is not only violating ALA's code of ethics, ALA's formal policy, possibly the library's policy, and possibly a state law, he/she can also be held liable. Five jurisdictions consider this to be a misdemeanor, with penalties ranging from fines of $300.00 to $2,000.00 and 90 days in jail.[37] Three jurisdictions even allow a patron to bring a civil suit against the librarian and/or the library for wrongful disclosure.[38] It certainly pays for librarians to know

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[35]Constance B. Cooke, "Confidentiality of Library Records," Queens Borough Public Library internal memo, dated 23 July 1990.

[36]Intellectual Freedom Manual, 106.

[37]Kennedy, 765. The five are Arizona, the District of Columbia, Colorado, Florida, and South Carolina.

[38]Ibid. The three are DC, Michigan, and Minnesota.

the laws in their respective states.

Although 41 states and the District of Columbia have laws governing the confidentiality of library records, it is not known with certainty what would happen if the federal government challenged a state's law. Up until now, the FBI and other federal agents have either complied with the laws and obtained court orders, or they have backed off due to adverse publicity--who can say what a court might decide?[39] While one writer believes that "it is reasonable to expect that the privacy of library records is protected by the first amendment,"[40] another has commented that "the constitutional arguments for the confidentiality of library records remain mere theories. They await acceptance or rejection in an authoritative judicial decision."[41]

It is not always easy to balance between the person's right to privacy and another's right to know, especially if disclosure of the records would result in something positive (such as in a murder case). Thus, some government requests for information are completely justified and legitimate; others, as a former ALA Intellectual Freedom Committee Chairperson noted, are dangerous:

> When the time comes in any society that government officials seek information as to what people are reading, it must be presumed that they expect to use these records as evidence of dangerous thinking. And when a government takes action to control what its citizens are thinking, it is a tell-tale sign that all is not well in that society.
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> . . . it is such small, beginning steps that lead a nation down the road to tyranny.[42]

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[39]Kennedy, 766.

[40]Johnson, 784.

[41]Kennedy, 754.

[42]David K. Berninghausen, 20 Jan. 1971, as quoted in Intellectual Freedom Manual, 104 (emphasis in the original).

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